

## Guardianship Ordinance

### CHAPTER 29. SAN MANUEL GUARDIANSHIP ORDINANCE<sup>1</sup>

#### SMTC 29.1 General Provisions

##### 29.1.1 Policy.

(a) It is the policy of the San Manuel Band of Mission Indians that guardianship of a minor child is an acceptable and sometimes preferable placement instead of adoption or long-term foster care.

(b) It is also the Tribe's policy to protect the health, safety, and welfare of vulnerable adults who are mentally incompetent, incapacitated, unable to resist fraud or undue influence, or otherwise unable to provide for themselves by providing a process for the provision of long term care and assistance.

(c) This ordinance is designed to provide a mechanism for guardianships in the San Manuel Tribal Court in which the initiating party has a legitimate interest in the welfare of the Proposed Ward and in which a guardianship is in the best interests of, and the least restrictive alternative for, the proposed ward.

(d) All provisions contained within this ordinance shall be interpreted by the Court with the policies set forth in (a) through (c) in mind.

(e) The Court shall resolve any ambiguities in this Ordinance in favor of the Proposed Ward.

##### 29.1.2 Definitions.

(a) **“Tribe”** means the San Manuel Band of Mission Indians.

(b) **“Court”** means the San Manuel Tribal Court.

(c) **“Incompetent Adult”** means a person, other than an unemancipated minor, who is unable, without assistance, to properly manage or take care of himself or herself or their personal affairs as determined by an evaluation by a psychiatrist or physician, licensed in any state of the United States and who has observed the person for the purposes of determining their ability to manage themselves. The term “Incompetent Adult” includes “Vulnerable Adults,” which means adults who are unable to resist fraud or undue influence that has resulted, or will likely result, in demonstrable harm. However, the imposition of a guardianship for a Vulnerable Adult does not require a finding of a lack of capacity by the tribal court.

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<sup>1</sup> Adopted by the General Council on December 11, 2007. Amended by the General Council on July 12, 2016.

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(d) **“Minor”** means an unemancipated person under eighteen (18) years of age who has no living parent, whose parents have had their parental rights suspended or terminated, or whose parents are unwilling or unable to exercise their parental rights.

(e) **“Proposed Ward”** means a Minor or Incompetent Adult over whom a guardianship is sought.

(f) **“Ward”** means a person for whom or over whose property a guardian has been appointed.

(g) **“Extended Family”** means a family member of the Proposed Ward to the fourth degree. Family members to the fourth degree include a grandparent, great-grandparent, great-great-grandparent, child, grandchild, great-grandchild, great-great-grandchild, brother, sister, aunt, uncle, great-aunt, great-uncle, niece, nephew, great-niece, great-nephew, and first cousin.

(h) **“Guardian of the Estate”** means a person or entity appointed to conserve the assets, income, and financial interests of a Ward, subject to a duty of disclosure and reporting to the Court regarding such matters no less frequently than annually. Any such order shall fix a date or dates for the filing of such reports, and may require the posting of a bond or other conditions to protect the Ward’s interests.

(i) **“Guardian of the Person”** means a person appointed to exercise custody and the power to make decisions of importance to a Ward’s health, education, support, and welfare. A Guardian of the Person may not manage the financial interests of the Ward unless he or she has been appointed by the Court as General Guardian, in which case any such management shall occur pursuant to his or her duties as Guardian of the Estate.

(j) **“General Guardian”** means a person appointed as the Guardian of both the Person and Estate of the Proposed Ward.

(k) **“Interested Party”** may have different meanings from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding. Subject to the foregoing, the term includes any of the following: (1) spouse, domestic partner, heir, devisee or beneficiary, who may be affected by the proceeding; (2) any person having priority for appointment as personal representative; (3) a fiduciary representing an Interested Party. Notwithstanding the foregoing, the Tribe shall always be considered by the Court as an Interested Party for the purpose of guardianship proceedings. An Extended Family member shall always be considered an Interested Party upon providing notice and proof to the Court of their relationship to the Proposed Ward and interest in the case.

### 29.1.3 Who May Be the Subject of a Guardianship.

(a) Tribal Members – The Court shall have authority to appoint guardians when the person for whom the guardianship is sought is a member of the Tribe or the child of

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a member of the Tribe, whether or not he or she lives on the San Manuel Indian Reservation.

(b) Non-Members – The Court shall also have authority to appoint guardians for non-members of the Tribe when the Proposed Ward (1) voluntarily submits to the jurisdiction of the San Manuel Tribal Court, or (2) is a family member, spouse, or significant other of a tribal member and is domiciled within the boundaries of the San Manuel Indian Reservation.

### **29.1.4 Who May File or Oppose a Petition for a Guardianship.**

(a) A petition for guardianship may be filed or opposed by any of the following persons:

- (1) Either or both parents, including a parent who is a Minor;
- (2) An Interested Party; or
- (3) A Minor himself or herself, if fourteen (14) years of age or older.

### **29.1.5 Who May Serve as Guardian.**

(a) Any person twenty-one (21) years of age or older and subject to the jurisdiction of the Tribe as set forth in the San Manuel Judicial Code (Chapter 22 of the San Manuel Tribal Code), may serve as a guardian, subject to the discretion of the Court.

(b) Preference shall be given to Extended Family of the Proposed Ward in order of their closeness of relationship. Some preference may be given to a person with whom the Proposed Ward is living at the time of the guardianship hearing. Preference shall also be given in accordance with the procedure set forth in SMTC 29.3.3.

(c) Notwithstanding the preferences established above in SMTC 29.1.5(b), the Court shall at all times consider and give the greatest weight to the best interests of the Proposed Ward in selecting a guardian.

## **SMTC 29.2 Forms of Guardianship**

### **29.2.1 Types of Guardianship.**

The types of guardianship shall include Guardianship of the Estate and Guardianship of the Person, and includes temporary and permanent guardianships of these types of guardianships.

### **29.2.2 Permanent Guardianship.**

(a) Of a Minor – In the case of a Minor, if the Court finds by clear and convincing evidence that the appointment of a permanent guardian is in the best interests of the

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Minor, the Court may appoint a permanent guardian under such terms and conditions as it sets forth in the written order. Permanent guardianship provides for permanent custody of a Minor to someone other than the parent(s), although there is no termination of the parental rights of the parents. There shall be a presumption of continued permanent guardianship to provide stability for the Minor. The Minor's parent(s) and Extended Family shall be granted liberal visitation rights unless such visitation is deemed by the Court as not in the best interests of the Minor. A permanent guardianship of a Minor may only be terminated in accordance with SMTC 29.6.1.

(b) Of an Incompetent Adult – If the Court finds by clear and convincing evidence that (1) the Proposed Ward is an Incompetent Adult as defined in Section 29.1.2(b) of this Chapter, and (2) it is in the best interests of the Proposed Ward to have a permanent guardian appointed, the Court may appoint a permanent guardian under such terms and conditions as it sets forth in the written order. Any permanent guardianship shall be the least restrictive alternative for the Proposed Ward. A permanent guardianship of an Incompetent Adult may only be terminated in accordance with SMTC 29.6.1.

### **29.2.3 Temporary Guardianship.**

(a) In emergency situations involving imminent or ongoing bodily harm to the Proposed Ward, or the loss of the Proposed Ward's property, and with good cause shown, the Court may appoint *ex parte*, a temporary guardian under such terms and conditions as it sets forth in the written order, subject to the provisions of subdivision (d).

(b) A temporary guardianship may be terminated if the Court determines that it is in the best interests of the Ward to do so. In the case of a Minor, this includes termination for the purpose of changing custody to a new guardian, or to return the Minor to a parent or care custodian.

(c) In all cases, parent(s) and Extended Family shall be granted liberal visitation rights unless deemed not in the best interests of the Ward by the Court.

(d) The Court shall have the power to grant, continue, or deny a petition for Temporary Guardianship and custody provided that full notice and an opportunity to be heard is given to all parties no later than five (5) days after the filing of the *ex parte* petition. This time may be shortened on order of the Court. An Interested Party shall be entitled to support, oppose, or otherwise participate in any hearing regarding a Temporary Guardianship. No guardian so appointed shall sell, dispose of, convey, or otherwise alienate title to or interest in the Ward's property during such temporary period absent Court order.

### **29.2.4 Guardianship of the Estate.**

The Court may appoint a temporary or permanent Guardian of the Estate under such terms and conditions as it sets forth in the written order. The guardianship may cover

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all real and personal property until the Minor reaches eighteen (18) years of age or until the Incompetent Adult is deemed competent, or it may be limited to only specific property or a specific legal action as set forth in the written order. A Guardianship of the Estate may only be terminated pursuant to SMTC 29.6.1.

### **29.2.5 Guardianship of the Person.**

The Court may appoint a temporary or permanent Guardian of the Person of a Proposed Ward under such terms and conditions as it sets forth in the written order. The powers of the Guardian include the ability to exercise custody and the power to make decisions of importance to the Ward's health, education, support, and welfare until 1) the Minor reaches eighteen (18) years of age, marries, or is emancipated, or until 2) the Incompetent Adult is deemed competent. Provided, that the powers of the Guardian may for good cause be limited by the Court to only specific actions as set forth in the written order. A Guardian of the Person may not manage the finances or assets of the Ward unless such Guardian is also appointed by the Court as General Guardian, in which case any such financial management shall occur pursuant to his or her duties as Guardian of the Estate. A Guardianship of the Person may only be terminated pursuant to SMTC 29.6.1.

### **29.2.6 General Guardian.**

The Court may appoint a person to serve as a General Guardian if such appointment is in the best interests of the Proposed Ward. The General Guardian shall serve as both Guardian of the Estate and the Person pursuant to SMTC 29.2.4 and 29.2.5, and under such terms and conditions as the Court sets forth in the written order.

## **SMTC 29.3 Appointment of Guardians**

### **29.3.1 How Guardians are Appointed.**

(a) Where a Proposed Ward is in need of a guardian, and no guardian is appointed pursuant to a valid will, health care directive or otherwise, the Court may appoint a guardian to promote the best interests of the Proposed Ward following the filing of a Petition in accordance with SMTC 29.4.1 *et seq.*

(b) In each case where a guardian is to be appointed, either by will, health care directive, or otherwise, a hearing shall be held following notice to the parent(s), the Tribe, family members of the Proposed Ward to the second degree, and any other Interested Party who has requested such notice.

### **29.3.2 Appointment of Guardian.**

(a) Of a Minor – Upon petition by a person authorized by SMTC 29.1.4, the Court may appoint a guardian for a Minor who is without both parents or whose parents are unavailable by reason of incarceration or commitment, or who are, by a showing of clear and convincing evidence, otherwise unable or unwilling to care for the Minor.

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(b) Of an Incompetent Adult – Upon petition by a person authorized by SMTC 29.1.4, the Court may appoint a guardian for an Incompetent Adult who, by a showing of clear and convincing evidence, is unable, without assistance, to properly manage or take care of himself or herself or his or her personal affairs.

(c) In any guardianship proceeding, the Court may consider as persuasive evidence an evaluation by a qualified psychiatrist, clinical psychologist or physician, licensed in any state of the United States, who has evaluated the person for the purposes of determining his or her ability to manage his or her personal affairs and/or whether the guardianship is in the Proposed Ward's best interests. A petitioner or the Proposed Ward may choose and hire a qualified licensed psychiatrist, clinical psychologist, or physician to conduct such an evaluation. Upon request by a party to a guardianship proceeding, the Tribal Court shall also provide a list of licensed public and private physicians who are qualified to conduct such evaluations.

(d) The decision to allow a person to petition for the appointment of a guardian shall be in the Court's discretion. The Court may impose any restriction or limitation on the powers of a guardian, or condition its appointment on the guardian's performance of specified duties, not inconsistent with this Chapter, if the Court finds it will help protect the Proposed Ward's best interests.

(e) A person may be a General Guardian, as set forth in SMTC 29.2.6, or the Court may appoint separate guardians in its discretion.

### **29.3.3 Proposed Ward May Nominate Guardian.**

(a) If a Proposed Ward is under the age of fourteen (14) years, an Interested Party may nominate their guardian. If the Proposed Ward is fourteen (14) years of age or older, and has the capacity to provide a nomination, the Proposed Ward may nominate his or her own guardian. Such nomination shall be given primary preference by the Court, provided it is freely given, the nominee is a suitable guardian, and the appointment is in the best interests of the Proposed Ward. Provided, that the parent(s) or an Interested Party may present evidence and testimony at a hearing in support of or in opposition to a Proposed Ward's nomination of a guardian.

(b) If the guardian nominated is not approved by the Court, the nominated guardian refuses to serve, or if, after being duly noticed by the Court, the Proposed Ward neglects for ten (10) days to nominate an alternative suitable person, the Court may nominate and appoint a guardian according to the best interests of the Proposed Ward.

### **29.3.4 Successor Guardians**

(a) If a guardian becomes unable or unwilling to serve, or for any other reason a vacancy occurs in the office of guardian, the Court may appoint a successor guardian for the Ward upon providing notice of such vacancy to all parties to the proceeding, subject

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to the other provisions of this Chapter and following a Petition as provided for in SMTC 29.4.1 *et seq.*

(b) The Ward shall have the same rights with respect to nomination of a successor guardian as provided in SMTC 29.3.3.

### **SMTC 29.4 Guardianship Proceedings**

#### **29.4.1 Petition.**

(a) Guardianship proceedings shall be initiated by the filing of a petition by a party authorized by SMTC 29.1.4. Provided, that the Tribe may only initiate proceedings to appoint a guardian if such appointment reasonably appears necessary and no other person has initiated such proceedings.

(b) Contents of Petition. The petition for guardianship shall include the following information:

(1) The name, sex, date and place of birth, present address, and tribal affiliation of the Proposed Ward;

(2) The name and address of the petitioner, and the nature of the relationship between the petitioner and the Proposed Ward;

(3) The names, dates of birth, address, and tribal affiliation of the Minor's or Incompetent Adult's parents;

(4) The name of the proposed guardian;

(5) The name and address of any person or agency having legal or temporary custody of the Proposed Ward;

(6) The basis for the Court's jurisdiction, the facts upon which the guardianship is sought, and the anticipated effects of the guardianship; and

(7) In the case of a Guardianship of the Estate, a statement describing the property owned, possessed, or in which the Minor or Incompetent Adult has an interest and the value of such property or property interest.

(c) If the information required under subdivisions (1), (2), (3) and (6) of subdivision (c) of this Section is not stated, the petition may be dismissed. If any of the other facts required hereunder are not known or cannot be ascertained by the petitioner, the petitioner shall so state in the petition. The petitioner shall sign and date the petition, and attest to the veracity of the information contained therein.

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### **29.4.2 Notice.**

(a) Notice of the hearing and a copy of the petition, certified by the petitioner or his or her representative or Court Clerk (if applicable), shall be served at least ten (10) days before the date of the hearing on the persons enumerated in subdivision (b) of this Section.

(b) Notice of the hearing and a copy of the petition shall be provided by the Petitioner to the Proposed Ward, any counsel for the Proposed Ward, the Tribe, and family members of the Proposed Ward to the second degree. Personal service is required on the Proposed Ward, unless waived by counsel for the Proposed Ward. For service other than the Proposed Ward, notice shall be given by registered or certified mail, return receipt requested. Service by publication or other means may be made by Petitioner upon application to the Court, provided an affidavit is submitted explaining why an alternate means of service is not possible and the Court finds good cause exists.

(c) In the case of a Minor, the Court shall also serve notice of the hearing to the parents of the Minor, the proposed guardian, or any other person whom the Court deems appropriate, and to the Proposed Ward if he or she is fourteen (14) years of age or older. The notice shall state that the party for whom a guardianship is being sought has the right to be represented by counsel under SMTC 29.4.5.

(d) In the case of a Minor, notice and appearance may be waived by a parent in writing in the presence of the Court, provided that such parent has been apprised by the Court of the meaning and consequences of the guardianship action. The parent who has executed such a waiver shall not be required to appear at the subsequent hearing. Where the parent is a Minor, the waiver shall be effective only upon approval by the Court.

### **29.4.3 Guardianship Report.**

(a) Upon the filing of a guardianship petition, the Court shall immediately request that the appropriate tribal department, other qualified agency, or if none exists, a qualified court-appointed social worker or qualified psychiatrist, clinical psychologist, or physician, licensed in any state in the United States, prepare a guardianship report on the proposed guardian and the Proposed Ward. Provided, that the parties to the proceeding may stipulate to the selection of a qualified social worker, psychiatrist, clinical psychologist, or physician, licensed in any state in the United States, to prepare the guardianship report as long as such arrangement does not unduly delay the proceedings.

(b) The guardianship report shall contain all pertinent information necessary to assist the Court in determining the best interests of the Proposed Ward, including information obtained through interviews with the Proposed Ward, the Proposed Ward's spouse or domestic partner, the Proposed Ward's relatives in the First Degree, and any objectors to the petition, where applicable. The Report should to the greatest extent practical contain information regarding the following:

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- (1) the Proposed Ward's wishes regarding the guardianship and who should serve as guardian;
- (2) the ability of the Proposed Ward to attend the hearing;
- (3) whether the Proposed Ward suffers from any mental deficits that would impair the Proposed Ward's ability to understand the nature of the proceedings;
- (4) whether the Proposed Ward wishes to be represented by counsel and who that counsel might be; and
- (5) the proposed guardian's fitness to serve.

(c) The guardianship report shall be submitted to the Court no later than ten (10) days before the hearing on the petition for appointment of a guardian. The Court may order additional reports as it deems necessary, provided that any such additional reports must be submitted no later than thirty (30) calendar days after the date originally scheduled for the hearing on the petition. No determination can be made on a permanent petition for guardianship until all required reports have been completed, submitted to and considered by the Court.

(d) The report submitted to the Court pursuant to this section is confidential. The report shall be considered by the Court and shall be made available only to the persons who have been served in the proceeding and the persons who have appeared in the proceeding or their attorneys. The report may be received in evidence at the Court's discretion upon stipulation of counsel for all such persons who are present at the hearing or, if such person is present at the hearing but is not represented by counsel, upon the consent of such person.

### **29.4.4 Consent to Guardianship of a Minor Child.**

(a) If a petition indicates that either or both parents of the Minor consent to the guardianship, or if at any time following the filing of a petition and before the entry of a final decree, a parent consents to the guardianship, each consenting parent shall acknowledge such consent in writing on a form promulgated by the Court, in its presence, evidencing to the satisfaction of the Court that the parent has voluntarily and knowingly consented to the guardianship and that the terms and consequences of such consent are understood by the parent. The Court shall also certify that either the parent or guardian fully understood the explanation in English or that it was interpreted into a language understood by the parent, guardian, or care custodian.

(b) No voluntary consent to guardianship by a parent shall be executed prior to or within ten (10) days after the birth of the Minor. A parent who is a Minor shall have the right to consent to the guardianship and such consent shall not be voidable by reason of such minority.

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(c) In any voluntary proceeding, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree, and where the Minor has been placed out of the family, the Minor shall be returned to the parent unless the Court finds good cause to the contrary not to return the Minor.

### **29.4.5 Right to Counsel**

A Proposed Ward who is the subject of a guardianship proceeding has the right to counsel. The court will appoint counsel for a Proposed Ward unless retained counsel makes an appearance on behalf of the Proposed Ward. If the ability to hire and direct counsel is in question, or the Proposed Ward is under the age of fourteen (14), the Court may appoint a *guardian ad litem* to represent the best interests of the Proposed Ward. In instances where the Proposed Ward cannot afford counsel, the Tribe shall pay the cost of the attorney or *guardian ad litem*. All fees and costs of an attorney or *guardian ad litem* for the Proposed Ward must be reasonable and are subject to approval by the Court.

### **29.4.6 Hearing.**

(a) At the hearing held on the petition for the guardianship, any party to whom notice was given shall have the right to appear and be heard with respect to the petition, including if requested, an evidentiary hearing. If the parent who is consenting to the guardianship appears at the hearing, the Court shall explain to the parent the meaning and consequences of the guardianship action.

(b) Upon finding at the hearing or at any time during the pendency of the petition that reasonable cause exists to warrant an examination, the Court, on its own motion or on motion of any party, may order the Proposed Ward to be examined by a qualified physician, psychiatrist, or licensed clinical psychologist, licensed in any state in the United States, and appointed by the Court. The Court may also order an examination of a parent or guardian whose competency to appear before the Court or ability to care for a Minor is at issue. The expenses of any examination ordered by the Court shall be paid by the petitioner, or if ordered on motion by a party, shall be paid for by that party unless such party or petitioner is unable to pay or other good cause is shown, in which case they shall be paid by the Court. If a moving party nominates a specific licensed physician, psychiatrist, or clinical psychologist to conduct the examination, the Court shall honor such request provided that the nominee is qualified to conduct the examination and the moving party agrees to pay for the nominee's services. The Court shall consider the results of the examination in ruling on the merits of the petition.

(c) The Court may, in any contested case, request the appropriate tribal department, qualified agency, or court-appointed physician, psychiatrist, licensed clinical psychologist, or social worker to make an investigation and submit a written report to the Court within thirty (30) calendar days from receipt of such request. The report shall contain such facts as may be relevant to determine whether the proposed guardianship will be in the best interests of the Proposed Ward, including the physical,

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mental, social, and financial condition of the proposed guardian, and any other factors the Court deems relevant to determine whether the proposed guardianship will be in the best interests of the Proposed Ward. The report may also be prepared by a licensed and qualified psychiatrist chosen by stipulation of the parties. The report is confidential and the Court may in its discretion require that any such report be filed under seal.

(d) If such a report is requested, the Court shall schedule a hearing not more than thirty (30) calendar days from the date of the expiration of the thirty (30) day time period or receipt of the report, whichever is earlier. The Court shall give reasonable notice of the investigation hearing to all parties to the first hearing.

(e) The report shall be admissible in evidence, subject to the right of any Interested Party to require that the person making it appear as a witness and subject himself to examination.

(f) At either the investigation hearing or the first hearing, if no investigation and report has been requested, the Court may approve the petition for guardianship and may appoint a guardian, if it finds by clear and convincing evidence, including the testimony of a qualified expert witness in the case of a Minor, that the guardianship is in the best interests of the Ward, and, with respect to any consenting adult, that such consent was voluntarily and knowingly given.

(g) In considering the best interests of the Proposed Ward, the Court shall consider, among other relevant factors, the following:

- (1) the health, safety, and welfare of the Proposed Ward;
- (2) the Proposed Guardian's fitness to serve, including but not limited to whether the Proposed Guardian has (i) a criminal history, (ii) a history of bankruptcy, (iii) a demonstrated history of unreliable, irresponsible, or destructive behavior, or (iv) a disqualifying conflict of interest that renders the Proposed Guardian unfit to serve;
- (3) the ability of the Proposed Guardian to help maintain the Proposed Ward's ties to, and involvement with, his or her Extended Family and Tribal culture and community;
- (4) the qualifications of the Proposed Guardian to serve in a fiduciary role;
- (5) the Proposed Guardian's ability to manage and to preserve the estate;
- (6) the Proposed Guardian's ability to make personal decisions on behalf of the Proposed Ward.

### **29.4.7 Findings and Orders.**

(a) For a Minor – The Court shall make written findings in determining whether to appoint a guardian for a Minor based on a consideration of:

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(1) The timeliness, nature and extent of services offered or provided to the Minor or parent by any tribal or state agency to facilitate the preservation of the family;

(2) The terms of any applicable order and the extent to which the parties have fulfilled their obligations thereunder;

(3) The feelings and emotional ties of the Minor to his or her parents, the proposed guardian, or any person who has provided physical care or custody to the Minor during the preceding year and with whom the Minor has developed significant emotional ties;

(4) The age of the Minor;

(5) The efforts the parent has made to make it in the best interests of the Minor to be reunited with the parent; and

(6) The extent to which the parent may have been prevented from maintaining a meaningful relationship with the Minor;

(b) For an Incompetent Adult – The Court shall make written findings in determining whether to appoint a guardian for an Incompetent Adult based on a consideration of:

(1) The health, psychological and financial needs of the Incompetent Adult;

(2) Whether the guardianship is the least restrictive alternative available for the Incompetent Adult in light of the community based services available.

(c) Whenever the Court finds that a guardian should be appointed, the Court shall appoint either a temporary or permanent guardian as appropriate under such terms and conditions as it sets forth in the written order.

(d) An appointment of a guardianship of a Minor shall not terminate the parental rights of the parents, however, the guardian shall have the responsibility for the care, custody and education of the Minor until he or she attains the age of eighteen (18) years, marries, is emancipated by the Court, or until the guardian is legally discharged. Any support obligation existing prior to the effective date of the Court's order shall not be severed or terminated.

### **29.4.8 Guardianship of an Incompetent Adult.**

(a) Determination of Incompetency – In the case of Incompetent Adults, if after a full hearing and examination upon such petition, and upon further proof by the certificate of a qualified physician showing that the Proposed Ward is incompetent and consideration of the factors set forth in 29.4.7, subdivision (b), and it appears to the Court by clear and convincing evidence that the Proposed Ward is not capable of taking care of himself or herself and of managing his or her property, the Court must appoint a

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Guardian of the Person and/or Estate within the powers and duties specified in this Chapter.

(b) Restoration of Competency – A person who has been declared incompetent, the guardian, or any Interested Person, may apply by petition to the Court in which they were declared incompetent, to have the fact of their restoration to capacity judicially determined. The petition shall be verified and shall state that such person is then competent. The Court shall require notice to be given of a hearing upon said petition at some date after said petition has been filed; and at the hearing upon said petition, witnesses shall be examined and a determination made by the Court as to whether the petition should be granted and the Incompetent Adult be declared of sound mind and capable of taking care of himself or herself and his or her property, his or her restoration to capacity shall be adjudged, and the guardianship of such person, if such person shall not be a Minor, shall cease.

### **SMTC 29.5 Duties of Guardian**

#### **29.5.1 Powers and Responsibilities of Guardian.**

(a) Except as otherwise specifically ordered or limited by the Court:

(1) A General Guardian or Guardian of the Person shall have the right to take or provide for the custody of the person of the Ward and shall be required to care for the health, safety and welfare of such person and provide for their education and medical care, as needed or appropriate. A General Guardian or Guardian of the Person shall adhere to all instructions expressed in a Ward's validly executed advance health care directive or similar instrument in making any decisions covered by such directive or instrument. A General Guardian or Guardian of the Person shall have the power to fix a residence that is in the Ward's best interest.

(2) A General Guardian or Guardian of the Estate shall have the authority to invest, manage and dispose of the property of such person in a prudent and reasonable manner and expend such portions of the estate, income and then principle, as reasonably necessary for the support, care, including medical care, and education of the Ward given the size and nature of the estate and the station in life and needs of the Ward.

(3) A General Guardian shall have power and authority to represent a Ward's best interests in actual, threatened or contemplated litigation or other proceedings of a legal nature, and to employ counsel, and settle or compromise suit or claims, subject to the approval of the Court.

(4) A guardian of any kind shall stand in a fiduciary relationship to the Ward; shall exercise a high degree of care in managing the estate of his or her Ward; shall derive no personal benefit of any kind from the management of the estate of his or her Ward; and shall be civilly liable to Ward for any losses to the estate attributable to a breach of these duties. Action to enforce such liability may be brought by the Ward or a

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subsequently appointed guardian on behalf of the Ward within two years after the appointment of a new guardian or the removal of the incompetency or the arriving at the age of majority.

(b) A guardian of any kind may petition the Court for authority to do any act about which he is uncertain, and the Court may grant such authority, after such notice and hearing, if any, as the Court may direct, if such appears to be consistent with the best interests of the Ward.

### **29.5.2 Security for Faithful Performance of Duties.**

The Court may, but is not required to, order a Guardian of the Estate to provide security in the form of a bond or otherwise to assure the faithful performance of the guardian's duties.

### **29.5.3 Oath; Letters of Guardianship.**

(a) The appointed guardian shall be required to take an oath, the form of which to be prescribed by the Court, to the effect that he or she will faithfully perform his or her duties as guardian.

(b) Upon taking the oath and filing with the Court such security, if any, as may have been required, the guardian shall be issued Letters of Guardianship ("Letters"), by the Court, as evidence of his or her appointment. Any limitation in the authority of the guardian shall be set forth on the Letters so issued.

### **29.5.4 Inventory and Appraisal.**

(a) Within forty five (45) days after the appraisal of a General Guardian or Guardian of Estate of a Minor or Incompetent Adult, the guardian shall prepare and submit to the Court an inventory and appraisal of the estate.

(b) The appraisal shall be made by one (1) disinterested persons regularly employed in the field of making such appraisals and who shall certify under oath to their appraisal and may receive reasonable compensation for their services.

(c) No appraisal shall be required of items of obvious, readily ascertainable value, e.g., bank account assets, or where the value of the estate is reasonably believed by the guardian to be less than \$1,000.00. If no appraisal is required, the guardian shall certify under oath to the obvious or estimated value of the assets not appraised.

### **29.5.5 Compensation.**

The Court may order monthly reimbursement payments to the guardian, provided sufficient funds exist from the Proposed Ward's estate. Said disbursements must be used by the guardian with custody of the Ward for the sole purpose of covering expenses incurred in the care and custody of the Ward and shall not be used for any other

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purpose. The use of said funds for any purpose other than that described in this section shall subject the guardian to civil penalties or remedies provided by Tribal law.

### **SMTC 29.6 Miscellaneous**

#### **29.6.1 Termination or Modification of Guardianship.**

(a) A temporary guardianship may be terminated or modified upon a determination that it is in the best interests of the Ward to change custody from the guardian to a new guardian or to return the Minor to the child's parent, or in accordance with subdivision (d).

(b) A permanent guardianship of a Minor shall be terminated upon a determination of the unsuitability of the permanent guardian or in accordance with subdivision (d). Provided, that the Court shall consider the competency or suitability of the parents in determining whether the termination of a permanent guardianship is in the Minor's best interests.

(c) Upon motion of a parent, the Tribe, or any other Interested Party, the Court may provide notice and a hearing on whether to terminate a guardianship. Grounds for termination or modification in addition to those contained in subdivisions (a) and (b) include personal use by the guardian of the assets of the Ward, failure to provide a reasonable level of care for the Ward, or the marriage of a Minor. No termination of the guardianship of a Minor or Incompetent Adult shall divest the person, in any way, to any right to or distribution of that Minor or Incompetent Adult's per capita payment in any way other than as otherwise permitted pursuant to the San Manuel Tribal Code. Further, the Court must consider whether it is in the best interests of the Ward to terminate the guardianship before doing so.

(d) A guardianship shall terminate automatically upon a Minor reaching age eighteen (18), or upon an Incompetent Adult being adjudged by the Court to have regained legal capacity, or in the case of a Vulnerable Adult, being determined to no longer be at risk of fraud or undue influence. A Guardian of the Estate must submit a Final Account and Report to the Court within three (3) months of the termination, unless waived by the Ward.

#### **29.6.2 Review of Guardianship.**

The status of all guardianships shall be reviewed by the Court at least once a year, or as otherwise directed. Whenever a Guardian of the Estate has been appointed, the guardian shall submit a yearly accounting and report regarding the guardian's use of the Ward's property to the Court for review and approval.

#### **29.6.3 Recovery of Fees.**

(a) By a Petitioner

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(1) At any time after the filing of a petition for the Guardianship of the Person, of the Estate, or both, but no later than 90 days from the issuance of letters or any other period of time as the Court for good cause orders, the person who filed the petition, regardless of whether or not he or she was appointed as guardian, may petition the Court for an order fixing and allowing compensation and reimbursements of costs undertaken by the petitioner, provided the Court determines that the petition for the appointment of the guardian was filed in the best interests of the Proposed Ward.

(2) Notice of the hearing shall be given for the period and in the manner provided for in SMTC 29.4.2 or in any other manner allowed by the court.

(3) Upon the hearing, the Court shall make an order allowing any compensation the Court determines is just and reasonable undertaken by the person petitioning for the Guardianship of the Person, the Estate, or both.

### **(b) By an Attorney**

(1) An attorney who has rendered legal services to the person petitioning for the Guardianship of the Person, of the Estate, or both, may petition the Court for an order fixing and allowing reasonable compensation or reimbursement for such services, including costs, rendered to that time, provided the Court determines that the petition for the appointment of the guardian was filed in the best interests of the Proposed Ward. Legal services for which the attorney may petition the Court for an order fixing and allowing compensation under this subdivision include those services rendered by a paralegal performing the legal services under the direction and supervision of an attorney. The petition or application for compensation shall set forth in detail the hours spent and services performed by the attorney and any paralegals.

(2) Upon the hearing, the Court shall make an order allowing such compensation as the Court determines reasonable, including costs, for services rendered to the petitioner.

### **29.6.4 Guardianship Records.**

The Tribe shall keep a separate, permanent file for each guardianship proceeding and shall file all papers relevant thereto, including petitions, notices, orders for hearings, etc. Any guardian duly appointed shall be entitled to receive, without charge, three certified copies of the Letters of Guardianship. Certified copies of filed papers shall be otherwise available at a fee per copy to be established by the Clerk of Courts in accordance with the San Manuel Judicial Code, including Rules of Court.

### **29.6.5 Registration of Foreign Guardianship Orders**

The Court may recognize a guardianship order from a foreign court that complies with the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act of 2007, provided the foreign guardian registers his or her order by filing it with the Court,

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submits to the jurisdiction of the Court, and obtains an order from the Court approving such registration.

### **29.6.6 Severability.**

In the event any provision of this Code is found to be invalid or unenforceable for any reason, such determination shall not affect the remaining terms.

### **29.6.7 Amendment.**

This Ordinance may be amended in the manner provided for the adoption of tribal ordinances. Amendments and additions to this Ordinance shall become a part of the Ordinance for all purposes and shall be codified and incorporated herein in a manner consistent with its numbering and organizations.

### **29.6.8 Prior Appointments Ratified.**

All Guardianship appointments enacted before the effective date of this Code shall be valid and binding. Prior appointments shall be subject to provisions of this Chapter beginning one (1) year after the Chapter's effective date.

### **29.6.9 Sovereign Immunity Preserved.**

Nothing herein shall be deemed to constitute a waiver of the Tribe's sovereign immunity from unconsented suit, which is hereby expressly reserved.

### **29.6.10 Effective Date.**

Adopted by the General Council on December 11, 2007. Amended on July 12, 2016.